

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
The Telephone Consumer Protection)	
Act of 1991)	

**REPLY COMMENTS OF AMERICAN BANKERS
ASSOCIATION AND CONSUMER BANKERS
ASSOCIATION IN SUPPORT OF PETITION FOR
EXPEDITED DECLARATORY RULING OF SOUNDBITE
COMMUNICATIONS, INC.**

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EXECUTIVE SUMMARY

Messages sent to consumers' mobile devices are an increasingly critical means of facilitating business-to-consumer and consumer-to-consumer communications. As SoundBite's pending petition for expedited declaratory ruling points out, however, litigation purportedly based upon the Telephone Consumer Protection Act increasingly interferes with the development and deployment of these services and communications. The record in this proceeding amply supports SoundBite's request for relief concerning confirming text messages sent in response to consumer opt-out requests. The Commission should promptly grant that relief. In addition, the American Bankers Association and the Consumer Bankers Association urge the Commission to grant broader relief that resolves ongoing legal uncertainty concerning the use of mobile services for a wide range of non-advertising communications. A declaration that technologies used to communicate with mobile devices, where those technologies lack the capacity to generate numbers randomly or in sequence, may be used for non-telemarketing purposes would serve the public interest and advance Congress's intent in passing the Telephone Consumer Protection Act.

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The American Bankers Association (ABA) and the Consumer Bankers Association (CBA) hereby file these reply comments in support of the petition for expedited declaratory ruling (Petition) of SoundBite Communications, Inc. (SoundBite).¹ ABA and CBA urge the Commission to grant SoundBite's Petition, and to take the opportunity presented by the SoundBite Petition to resolve the legal uncertainty surrounding a broad range of consumer-friendly services based upon mobile communications.

¹ Petition for Expedited Declaratory Ruling in CG Docket No. 02-278 (filed Feb. 16, 2012). The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets. The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services. CBA provides leadership, education, research and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

**I. SOUNDBITE’S PETITION AND THE SUPPORTING COMMENTS
DEMONSTRATE THE VALUE AND LAWFULNESS OF CONFIRMING TEXT
MESSAGES**

SoundBite’s Petition correctly identifies a type of message, essential to many valuable informational texting programs, that nonetheless subjects senders to needless legal risk under the Telephone Consumer Protection Act (TCPA) as presently interpreted by this Commission.² As SoundBite and various commenters point out, opt-out confirmation text messages that acknowledge a consumer’s request not to receive further texts from a sender are a best practice required by the Mobile Marketing Association.³ Those messages also are integral to a number of informational messaging programs that this Commission, in a recent order entered in this docket, expressly declared its intention not to impede or unnecessarily restrict.⁴ In the markets served by ABA and CBA members, those programs include suspicious activity alerts concerning payment cards and breach notification messages that prevent fraud, protect against defaults and

² Petition at 1-5. The TCPA is codified at 47 U.S.C. § 227.

³ See Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0, § 1.6 (March 1, 2011), available at mmaglobal.com/bestpractices.pdf. As SoundBite’s Petition points out, “[w]ireless operators, aggregators, and CTIA – The Wireless Association® require companies . . . to follow the MMA Best Practices before they will enable and allow text messaging campaigns on their networks.” Petition at 3. Accordingly, failure to send confirming texts, and to incur the associated legal risks, may deprive a company of the ability to engage in text messaging campaigns at all, including the sending of messages this Commission specifically has endorsed.

⁴ “While we observe the increasing pervasiveness of telemarketing, we also acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Report and Order rel. Feb. 15, 2012) (2012 TCPA Order). See also Comments of the Future of Privacy Forum at 3-4; Comments of CTIA – The Wireless Association® (CTIA Comments) at 10.

foreclosures, respond to service inquiries and protect against disasters.⁵ These messaging programs permit consumers to opt out of receiving further messages from the sender, and those opt-out requests are confirmed by prompt return messages sent to the consumers' mobile devices.

However, because opt-out confirmation messages are sent after receipt of consumers' opt-out requests, plaintiffs' attorneys have characterized those messages as lacking the prior express consent normally required, under the TCPA, for calls placed to mobile telephone numbers using automatic telephone dialing systems.⁶ Those claims have given rise to multi-million dollar class action plaintiffs' lawsuits.⁷ Those lawsuits, and the risk of additional litigation and enforcement proceedings, jeopardize the ability of businesses to confirm the receipt of customers' opt-out requests by the most efficient and lowest-cost means.

The comments filed in this proceeding amply support SoundBite's contention that opt-out confirmation text messages benefit consumers and serve the public interest. As CTIA points out,

⁵ See Comments of the Financial Services Roundtable, the American Bankers Association, and the Consumer Bankers Association (CG Docket No. 02-278, May 21, 2010); *see also* Reply Comments of the Financial Services Roundtable, the American Bankers Association and the Consumer Bankers Association (CG Docket No. 02-278, June 21, 2010) at 4-5. The rulemaking that resulted in this Commission's order of February 15, 2012 included endorsements of various messaging programs by the Board of Governors of the Federal Reserve, the Department of Education and the Department of Transportation.

⁶ 47 U.S.C. § 227(a).

⁷ See, e.g., *Annoni v. FYIsms.com, LLC*, Case No. 11-cv-1603 (N.D. Ill.); *Emanuel v. NFL Enterprises, LLC*, Case No. 11-cv-1781 (S.D. Cal.); *Gutierrez et al. v. Barclays Group et al.*, Case No. 10-cv-1012 (S.D. Cal.); *Holt v. Redbox Automated Retail, LLC*, Case No. 11-cv-3046 (S.D. Cal.); *Jaber v. NASCAR Holdings, Inc.*, Case No. 11-cv-1783 (S.D. Cal.); *Karayan v. GameStop Corp. and GameStop Inc.*, Case No. 11-cv-1777 (S.D. Cal.); *Lo v. Oxnard European Motors, LLC et al.*, Case No. 11-cv-1009 (S.D. Cal.); *Maleksaeedi v. American Express Centurion Bank*, Case No. 11-cv-790 (S.D. Cal.); *Ryabyshchuk v. Citibank*, Case No. 11-cv-1236 (S.D. Cal.).

confirming messages protect consumer privacy, “help authenticate subscribers and ensure that it is actually the subscriber making the opt-out requests.”⁸ As Twilio Inc. states, the confirming message “ends any ambiguity of the consumer about whether the company has received the request to no longer receive text messages.”⁹ For these reasons, the Mobile Marketing Association requires such messages to be sent as part of its more general requirements of “transparency, notice and choice” for consumers of mobile marketing and information services.¹⁰

The few comments that oppose SoundBite’s Petition do not demonstrate that opt-out confirmation messages are contrary to the public interest. The National Association of Consumer Advocates (NACA), for example, argues that confirming messages may result in charges to recipients.¹¹ In fact, however, most of SoundBite’s opt-out confirmation messages already are sent on a free-to-end user basis, and ABA and CBA would support a Commission requirement that such messages be sent without charge to the recipient. NACA also argues that some confirming messages may contain marketing materials or solicitations of additional contacts by the customer.¹² However, SoundBite’s request for relief does not encompass the use of opt-out confirmation messages for marketing purposes, and the Mobile Marketing Association Guidelines do not endorse that practice. Similarly, the ABA and CBA and their members do not intend to use opt-out confirmation messages to convey advertising and promotional content, and will comply with a Commission prohibition on that practice.

⁸ CTIA Comments at 9-10; *see also* Comments of Future of Privacy Forum at 2-3.

⁹ Comments of Twilio Inc. at 9; *see also* Comments of Verizon and Verizon Wireless at 7-8.

¹⁰ Comments of the Mobile Marketing Association in Support at 1.

¹¹ Comments of the National Association of Consumer Advocates at 6-7 (NACA Comments).

¹² NACA Comments at 7-12.

Besides demonstrating that opt-out confirmation messages serve the public interest, SoundBite’s Petition and the supporting comments offer a number of sound legal arguments for a finding that confirming text messages are lawful under the TCPA. Notably, as SoundBite points out, these messages arguably fall within the existing “grace period” for processing of do-not-call requests or could, in the alternative, be made subject to a separate, brief grace period applicable specifically to the sending of confirmation messages.¹³ Similarly, as a number of commenters note, a consumer’s decision to participate in an informational texting program constitutes consent to any communication that is integral to the program, including the transmission of a message that confirms the consumer’s request to terminate his or her participation.¹⁴ Finally, as many commenters note, because the technology used to send confirming messages does not meet the statutory definition of an automatic telephone dialing system, the TCPA’s requirement of prior express consent does not apply to those messages at all.¹⁵

Comments opposing SoundBite’s Petition do not support a different result. NACA, for example, characterizes the Petition as unnecessary under the TCPA because senders can obtain permission to send confirming messages before the message is sent, thereby making the

¹³ Petition at 4-5.

¹⁴ CTIA Comments at 5-7; Comments of Verizon and Verizon Wireless at 4-7; Comments of Twilio Inc. at 5-6. As the Commission points out in its order of February 15, 2012, a consumer’s decision to provide a mobile contact number as part of a business relationship constitutes prior express consent to receive automated calls from the business at that number. 2012 TCPA Order at n. 20 and n. 24. Logically, this consent extends to any communication that is integral to the relationship, including a confirming response to an opt-out message from the customer.

¹⁵ Petition at 5-7; Comments of Verizon and Verizon Wireless at 9-10; Comments of Twilio Inc. at 7-8; GroupMe, Inc.’s Comments at 5-7; Comments of the Future of Privacy Forum at 4-5. As discussed further below, ABA and CBA urge the Commission to take this opportunity to resolve the ongoing confusion and uncertainty concerning the proper definition of “automatic telephone dialing system” under the TCPA.

confirming messages compliant with the TCPA.¹⁶ This argument, however, ignores the fact that under the Mobile Marketing Association guidelines, the obligation to send confirming text messages applies even when consumers do not specifically consent to receive those messages. Accordingly, unless 100 percent of consumers consent to receive confirming messages, compliance with industry best practice will continue to require senders to transmit confirming messages at the risk of litigation.

The Petition and supporting comments fully support the requested finding that confirming text messages are lawful under the TCPA. In view of the potential harm to consumers' interests posed by the ongoing flood of unjustified litigation challenging those messages, the Commission should expedite its favorable consideration of SoundBite's petition.

II. THE COMMISSION SHOULD RESOLVE THE LEGAL UNCERTAINTY SURROUNDING A BROAD RANGE OF USEFUL MESSAGING SERVICES

Confirming messages of the kind described in SoundBite's Petition are only one of many kinds of messages that are both helpful to consumers and potential sources of legal risk under the TCPA. In fact, the comments filed concerning the SoundBite petition, and other petitions pending before this Commission, identify several types of non-advertising messages that may be sent by senders that arguably have not obtained the provable, prior express consent of the recipients.

GroupMe, Inc., for example, points out in its comments and in its pending petition for declaratory relief that some services permit individuals to send personal text messages to a group of recipients selected by those individuals, thereby improving the efficiency of increasingly

¹⁶ NACA Comments at 4-6.

popular text messaging.¹⁷ Because the provider of such a group texting service lacks a direct relationship with the recipients of the future messages, it arguably lacks prior express consent to send an initial, administrative message that asks the designated recipients to opt in to receipt of future messages. The threat of litigation aimed at these administrative messages interferes with services that consumers find useful and desirable.

Also, as the Cargo Airline Association has pointed out, package delivery notifications can be sent efficiently and at low cost by means of messages to recipients' mobile devices.¹⁸ However, because the delivery service lacks a business relationship with the recipient, it is difficult for delivery services to obtain or document the package recipient's prior express consent to receive these useful notifications.¹⁹

Similarly, as GroupMe's comments point out, a parent registering a child for school might provide both parents' mobile telephone numbers as contact numbers. The school should not risk legal liability when it sends school closing and other messages to the mobile number of the parent who did not personally provide that number.²⁰

Finally, innovative companies are developing a number of services, such as mobile money transfer products, that depend upon the transmission of administrative messages to potential recipients of funds, or to other persons who might not have a business relationship with the institution sending the message. In these cases, as in the group texting, package delivery and

¹⁷ GroupMe, Inc.'s Comments at 2; GroupMe, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (March 1, 2012) at 6-9.

¹⁸ See Letter from Michele C. Farquhar to Marlene H. Dortch in CG Docket No. 02-278 (Apr. 25, 2012).

¹⁹ *Id.*

²⁰ GroupMe, Inc.'s Comments at 4-5.

school notification scenarios, the threat of TCPA litigation serves no public interest purpose and interferes with the development of new applications that help consumers and create jobs in one of the fastest-growing sectors of the economy.²¹

Proponents of these mobile messaging applications have suggested rationales under which the Commission could declare their lawfulness. For example, GroupMe urges the Commission to find that an intermediary, such as a customer who designates other individuals to receive group texts sent by the service at the customer's behalf, may convey those recipients' prior express consent to receive those texts.²² ABA and CBA support this intermediary consent concept, but note that it might not cover all of the useful messaging scenarios that arise and might add additional complexity and cost to the services provided. In order to ensure the lawfulness of all types of pro-consumer, non-telemarketing messages, the Commission should confirm that the technologies used to send these messages to specific consumers are not automatic telephone dialing systems (ATDSs), and should find that such non-ATDS dialing equipment may be used to send non-telemarketing messages to mobile devices without the recipient's prior express consent.

²¹ See, e.g., Comments of Twilio Inc. at 3, pointing out a recent TechNet sponsored study finding that the app economy represented 460,000 jobs, up from zero in 2007. As Twilio also points out, FCC Chairman Genachowski has stated that a conservative estimate of one job per app means that thousands of jobs have been created during the recent mobile app boom. Encouragement of these new services is an essential part of the Commission's plan to encourage the deployment of advanced mobile services to a larger part of the U.S. population. See Federal Communications Commission, "Connecting America: the National Broadband Plan" (2010).

²² GroupMe, Inc. Petition for Expedited Declaratory Ruling and Clarification at 16-19.

III. THE COMMISSION SHOULD DECLARE THAT NON-ATDS DIALING TECHNOLOGIES MAY BE USED TO SEND NON-TELEMARKETING MESSAGES WITHOUT THE RECIPIENT'S PRIOR EXPRESS CONSENT

Beginning at least as early as 2002, various parties have asked the Commission (and, in some cases, the courts) to resolve the uncertain status of various dialing technologies under the TCPA's ATDS definition, which states that an ATDS is "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator, . . . and to dial such numbers."²³ The legislative history of the TCPA leaves no doubt that Congress adopted this definition in 1991 in order to limit a phenomenon specific to the time: *i.e.*, the use by telemarketers of devices that simply generated numbers using a random or sequential algorithm, potentially flooding mobile telephone users with costly calls based only on the coincidence that an algorithm generated the users' numbers.²⁴

As newer technologies facilitated the dialing of calls from databases of numbers of existing customers or other defined recipients of the intended messages, the Commission and the courts could reasonably have declared that those devices, which did not rely upon random or sequential number generators, fall outside the ATDS definition.²⁵ Unfortunately, this approach generally has not been followed.

²³ 47 U.S.C. § 227(a)(1).

²⁴ As the Senate Report accompanying the TCPA pointed out, the statute was enacted to control "the use of automated equipment to engage in telemarketing." Sen. Rep. No. 102-178 at 1, 1991 U.S.C.C.A.N. 1968, 1969 (1991). The Senate Report also noted that telemarketers "often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations as well as unlisted telephone numbers." *Id.* Nothing in the legislative history suggests that Congress intended to require prior express consent for non-telemarketing calls, or for calls that were dialed by automated means that did not involve the use of random or sequential number generators.

²⁵ The Commission took this approach in 1992, when it noted that debt collection calls are not subject to the FCC's identification rules "because such calls are not autodialer calls (*i.e.*, dialed

Specifically, the courts have found that the definition applies, not just to equipment that is used to dial numbers sequentially or at random, but to equipment that has the capacity to do so.²⁶ This “capacity” approach, which is based on the unfortunate drafting of the statute, has led to complex inquiries into the potential of various types of equipment to generate random or sequential numbers. Class action plaintiffs argue, in effect, that if a software-driven device could be reprogrammed to generate random or sequential numbers, or has such a feature that could be enabled with some level of effort; or is somehow associated with hardware that has or could have that capability; then the capacity question is resolved in the plaintiff’s favor. Ongoing confusion over the capacity question has prolonged litigation and involved courts in disputes over technological capabilities that, because they are never used, have no impact upon the consumer interests the TCPA is written to protect.

The Commission’s approach to the ATDS definition also has delayed and complicated the resolution of this critical question. In its TCPA order entered in 2003, the FCC took the position that it will extend the autodialer definition to any equipment that has the “capacity to dial numbers without human intervention.”²⁷ This approach entirely reads out of the definition the statutory requirement that an ATDS must have the capacity to store, produce and dial numbers using a random or sequential number generator.²⁸

using a random or sequential number generator) . . .”) *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 39 (1992).

²⁶ See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th Cir. 2009); *Vance v. Bureau of Collection Recovery LLC*, 2011 U.S. Dist. LEXIS 24908 (N.D. Ill. 2011); *Abbas v. Selling Source LLC*, 49 Comm. Reg. (P&F) 66 (N.D. Ill. 2009).

²⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 132 (2003).

²⁸ One court has taken the position that the FCC’s “capacity to dial numbers without human intervention” standard trumps the TCPA’s “capacity to store, produce and dial numbers using a

ABA and CBA do not dispute Congress's intention to control abusive automated dialing practices by telemarketers. The Commission can advance the intent of the TCPA by confirming what the statute says: *i.e.*, that ATDSs are equipment with the capacity to use a random or sequential number generator to store or produce, and to dial, numbers to be called. The Commission then should adopt a common-sense reading of the capacity requirement. Specifically, the Commission should find that dialing systems lack the required capacity unless the equipment can be used, without modification of the hardware, reprogramming of the software, or enabling of features that the device could support but that are not available as the device is currently operated or configured, to generate numbers randomly or in sequence.

This interpretation of the ATDS definition would confirm the meaning of that definition as Congress wrote it, and would advance the intent of Congress to prevent vexatious dialing of cellphone customers by telemarketers using robot number generators. Use of any ATDS, so defined, to make calls to mobile and emergency numbers would continue to be prohibited except in an emergency or with the prior express consent of the called party.²⁹

Specifically, ABA and CBA urge the Commission to find that callers may use devices that automate the dialing of numbers, but that do not meet the statutory ATDS definition, to place non-telemarketing calls to mobile devices without the recipients' prior express consent. This simple finding will permit the confirmation messages, personal group texting services,

random or sequential number generator" language, with the apparent result that equipment lacking all potential to produce, store or dial numbers using a random or sequential number generator will be treated as ATDSs by courts hearing plaintiffs' class action TCPA complaints. *Griffith v. Consumer Portfolio Services, Inc.*, Memorandum Opinion, Case No. 10-2697 (N.D. Ill. Aug. 16, 2011).

²⁹ Having made this clarification the Commission still could, if it found such action to be in the public interest, clarify its regulations to limit the use of non-ATDS dialing technologies by telemarketers.

package delivery notifications and other useful services that are the subjects of pending petitions and comments, without encouraging telemarketers to place unsolicited advertising calls to mobile telephones by automated means, including the use of devices that meet the ATDS definition. Such broad relief also will permit service providers to develop and implement new, advanced non-telemarketing equipment and services without seeking piecemeal rulings from the Commission as to their legality, and without risking needless litigation. At the same time, consumers would continue to enjoy the full range of protection from abusive telemarketing practices set out in the TCPA and the Commission's regulations, including the right to list their residential telephone numbers on the do-not-call registry and to make company-specific do-not-call requests.

The SoundBite Petition and other pending requests for relief offer the Commission an opportunity to resolve a question that is causing entrepreneurs and other providers of new services to waste scarce resources on protracted litigation that confers no benefit on consumers.

In keeping with its mandate to encourage, rather than hinder, the deployment of advanced services that create jobs and benefit the public, the Commission should take this opportunity to grant the requested relief promptly.

Respectfully submitted,

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